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No. 05-88

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In The

Supreme Court of the United States

CORNELIUS COOPER, et al.,

Petitioners,

v.

SOUTHERN COMPANY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeal For The Eleventh Circuit

BRIEF OF THE IMPACT FUND, ASIAN LAW CAUCUS, INC., ASIAN PACIFIC AMERICAN LEGAL CENTER, EMPLOYMENT LAW CENTER, EQUAL RIGHTS ADVOCATES, AND PUBLIC ADVOCATES, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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I. INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are all non-profit organizations involved in protecting the rights of individuals who have experienced discrimination in the workplace. *Amici curiae* represent low and moderate-income individuals who lack the financial and legal resources necessary to enforce their rights through individual lawsuits, making class actions a critical tool for such enforcement. Collectively, *amici* have decades of experience litigating individual and class action employment discrimination and other civil rights claims in federal and state courts, and are therefore highly knowledgeable about the legal issues relevant to this case. *Amici* have frequently contributed to the development of key Title VII and Federal Rule of Civil Procedure 23 precedents in the field of class action employment discrimination – through impact litigation as well by participating as *amicus curiae* in cases before this and other courts addressing precedent-setting issues.

The Impact Fund is a legal non-profit foundation in Berkeley, California. The Impact Fund provides funding, training, advice and counseling, and *amicus* representation to non-profit organizations regarding civil rights, class action and related issues. The Impact Fund has served as class counsel in numerous civil rights class actions and is currently lead counsel in *Dukes v. Wal-Mart Stores,* (N.D. Cal., No. C 01-2252 MJJ), a nationwide sex discrimination

[1] The parties have consented to this brief and a letter of consent has been lodged with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that no party to this case had any role in writing this brief and that no one other than *amici* made a monetary contribution to its preparation or submission.

class action challenging pay and promotion practices at the nation's largest private employer.

The **Asian Law Caucus, Inc.** ("ALC"), established in 1972, is the country's oldest civil rights and public interest legal organization serving the Asian Pacific American community. The ALC represents primarily low-income, monolingual or limited English proficient Asian Pacific Americans in the areas of employment/labor, immigration, housing/community development, and civil rights. ALC has represented Asian Pacific American workers in numerous employment discrimination cases, including *EEOC and Castrejon v. Tortilleria "La Mejor,"* 758 F. Supp. 585 (E.D. Cal. 1991) (Title VII case holding that undocumented workers are protected against sex discrimination in employment, notwithstanding the passage of the Immigration Reform and Control Act of 1986) and *Ramirez v. General Services Administration, et al.*, Case No. C 93-0539 VRW (N.D. Cal. 1993) (accent discrimination case involving five Filipino security guards who were removed from their posts at the Department of Treasury building by American Mutual per a request from GSA).

The **Asian Pacific American Legal Center** of Southern California (APALC) was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community. APALC provides direct legal services and uses impact litigation, public advocacy and community education to obtain, safeguard and improve the civil rights of the Asian Pacific American community. Its primary areas of work include workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights and hate crimes.

The **Employment Law Center** (ELC), a project of the Legal Aid Society of San Francisco, has long litigated on behalf of persons of color, recent immigrants, women, individuals with disabilities, sexual minorities, and other traditionally subordinated, low-income communities on issues of workplace rights.

Equal Rights Advocates (ERA) is a San Francisco-based human and civil rights organization dedicated to securing legal and economic equality for women through litigation, advocacy and public education. For 25 years, ERA has represented the rights of women in the courts, legislatures, and public education campaigns. It has undertaken difficult impact litigation that no private firm would handle that has resulted in establishing new law and provided significant benefits to large groups of women.

Public Advocates, Inc. is one of the oldest non-profit public interest law firms in the nation. Throughout its history, the firm's mission has been to challenge the persistent, underlying causes and effects of poverty and discrimination and to work for the empowerment of the poor and people of color. Public Advocates uses diverse litigation and non-litigative strategies. Its current efforts focus on education, health care, telecommunications, employment, community economic development and insurance redlining.

II. REASONS FOR GRANTING THE WRIT

This Court has long recognized that the class action procedure furthers judicial efficiency and ensures the "vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Products v. Windsor*, 521 U.S. 591, 617 (1997), *citing* Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969). For the enforcement of this nation's civil rights laws, the class action mechanism serves additional – and even more critical – public policy goals.

The Eleventh Circuit's decision in this case creates an insurmountable barrier to class certification in Title VII cases. It puts plaintiffs to the all but impossible burden of proving their case on the merits at the class certification stage. The decision jeopardizes the ability of plaintiffs to obtain Rule 23(c)(4) certification of injunctive relief only – essential to eliminating systemic discrimination in their workplace. *Certiorari* should be granted because the decision in this case undermines the future viability of Title VII class actions and the critical role they serve in the enforcement of civil rights protections.

A. *Certiorari* is Necessary to Protect the Use of Class Actions to Enforce Civil Rights

With the passage of the Civil Rights Act of 1964, Congress expressly provided for private enforcement of the nation's civil rights laws to supplement public agency enforcement. "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad

compliance with the law." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 (1968). Private class actions have proven to be a highly effective tool in battling race and gender discrimination in the workplace. *See* H. Newberg and A. Conte, *Newberg on Class Actions*, §24:1, at 5 (4th Ed. 2002) ("employment class actions are an excellent means to eradicate widespread or institutional-scale discrimination").

Most fundamentally, class actions provide a mechanism for individual victims of discrimination to obtain relief, even though the value of their back pay claims may be small. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Products*, 521 U.S. at 617, *citing Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). For the millions of low-wage workers in the United States, a claim for unequal pay or a lost promotional opportunity may translate into no more than $10 or $20 per paycheck – an amount that could never justify a federal lawsuit. Without the benefit of class actions, the alternative will likely be no lawsuit at all. *See Carnegie v. Household International, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("the *realistic* alternative to a class action is not 17 million individual suits, but zero individual lawsuits, as only a lunatic or a fanatic sues for $30 dollars") (emphasis in original).

In this regard, civil rights class actions provide the same policy benefit as class actions for other small value claims, such as consumer claims. But, civil rights class actions serve other and unique purposes in enforcing anti-discrimination laws.

Civil rights class actions provide a means of achieving justice for victims who would not sue on their own because of their justifiable *fear of retaliation*. Civil rights is a hollow promise when the cost of vindicating those rights is the weekly paycheck upon which a struggling family must survive. When workers join together to challenge their employer's practices in court, each class member is far less vulnerable to retaliation in the form of harassment or job loss. This 'strength in numbers' is particularly important because discriminatory practices often target the most economically vulnerable groups, many of whom may also be unfamiliar with the legal system.

Courts have long recognized that this fear of retaliation is one factor that demonstrates individual lawsuits are not a practical alternative to the class action. This is particularly true when class members are current employees. Indeed, "the risks entailed in suing one's employer are such that the few hardy souls who come forward should be permitted to speak for others when the vocal ones are otherwise fully qualified." *Ste. Marie v. Eastern R.R. Ass'n*, 72 F.R.D. 443, 449 (S.D.N.Y. 1976). *See also Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 624 (5th Cir. 1999) (class certified where "putative class members still employed by the Casino might be reluctant to file individually for fear of workplace retaliation"); *Arkansas Educ. Assn. v. Board of Educ. of Portland*, 446 F.2d 763, 765 (8th Cir. 1971) (class of 20 public school teachers certified who might have "natural fear or reluctance to bring this action on an individual basis"); *Adames v. Mitsubishi Bank, Ltd.*, 133 F.R.D. 82, 89 (E.D.N.Y. 1989) ("[s]ince here a number of putative members are current employees, the concern for possible employer reprisal action exists and renders the alternative of individual joinder less than practicable.").

Civil rights class actions also permit district courts to order *broad injunctive relief* to require an employer to change its practices, if a violation is proven. District courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Indeed, "the primary objective of Title VII is prophylactic." *Williams v. Owens-Illinois*, 665 F.2d 918, 931 (9th Cir. 1981). "Towards this end, Congress has granted broad equitable powers to enable the courts to fashion the most complete relief possible." *Id.*, *citing Albemarle*, 422 U.S. at 418. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770-71 (1976) ("discretion is vested not for purposes of 'limit[ing] appellate review of trial courts, or . . . invit[ing] inconsistency and caprice,' but rather to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." (citation omitted).

In contrast, this same kind of broad injunctive relief – the hallmark of a Title VII class action – is ordinarily *not* available in an individual employment discrimination action. *See, e.g., Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1047 n.3 (5th Cir. 1996); *Meinhold v. Department of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994). Indeed, in some circuits, individual plaintiffs are not permitted to bring pattern and practice claims at all, absent a certified class. *See, e.g., Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998); *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355 (5th Cir. 2001); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866-67 (7th Cir. 1985). In the Ninth Circuit, a court may not order injunctive relief that benefits anyone other than the plaintiffs in an individual case. *Zepeda v. I.N.S.*, 753 F.2d

719, n.1 (9th Cir. 1984) ("if this elementary principle were not true, there would be no need for class actions").[2]

In civil rights class actions, district courts have exercised their equitable powers to fashion a wide variety of injunctive orders specifically targeted at the employment practices found to be discriminatory. For example, courts have ordered defendants to change specific employment practices to remedy discrimination. *See, e.g., Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140 (2nd Cir. 1991) (company ordered to change the way an employment test was used so that banding of test scores was required); *Reed v. Arlington Hotel Co. Inc.*, 476 F.2d 721 (8th Cir. 1973) (company required to abolish distinction between two departments and merge jobs to remedy discrimination in hiring and promotions). Other courts have required affirmative action to remedy past discrimination. *See, e.g., Davis v. City and County of San Francisco*, 890 F.2d 1438, 1449-52 (9th Cir. 1989) (requiring affirmative action in the hiring of women and people of color for firefighter positions). Defendants may be required to maintain records of its employment decisions and report to the court on their progress. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 (1977). A district court also may appoint a special master

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[2] When Rule 23 was overhauled in 1966, the Federal Rules Advisory Committee specifically included subsection (b)(2) to authorize such injunctive actions to facilitate the vindication of civil rights through the class action device. *Wetzel v. Liberty Mutual Insurance Company*, 508 F.2d 239, 250 (3rd Cir. 1975); Advisory Committee Notes to 1966 Amendments to Rule 23 (West 2003). *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997) ("civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of (b)(2) cases).

to monitor compliance with its orders in the workplace. *See, e.g., Local 28 of the Sheet Metal Workers' International Association v. E.E.O.C.*, 478 U.S. 421 (1986).

Although enforcement efforts have largely eliminated the most overt forms of employment discrimination, civil rights class actions remain a necessary tool to combat systemic discrimination. *See, e.g., Allen v. International Truck and Engine,* 358 F.3d 469 (7th Cir. 2004) (black employees successfully sought class certification for a hostile workplace claim); *In re Monumental Life Insurance Co.,* 365 F.3d 408 (5th Cir. 2004) (class of black policyholders challenged insurance company's practice of paying lower benefits and charging higher premiums); *Robinson v. Metro North Commuter Railroad,* 267 F.3d 147 (2nd Cir. 2001), *cert. denied,* 535 U.S. 951 (2002) (court certified class of black employees challenging company's alleged practice of race discrimination in pay and promotion); *Dukes v. Wal-Mart Stores,* 222 F.R.D. 137 (N.D. Cal. 2004) (court certified class of more than 1.6 million women challenging gender discrimination in pay and promotion); *Abdallah v. Coca-Cola,* 133 F.Supp.2d 1364 (N.D.Ga. 2001) (settlement valued at $192.5 million in race discrimination class action). *Certiorari* should be granted because the decision in this case threatens the effectiveness of this tool for the enforcement of essential civil rights protections.

B. *Certiorari* Should Be Granted to Clarify the Standard for Satisfaction of Rule 23 in Title VII Class Actions

In *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974), this Court expressly prohibited a district court from evaluating the underlying merits of an action when considering whether the case should be certified as a class

action. Nothing in Rule 23 "gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. While a district court may "look beyond the pleadings" at the substantive claims of the parties to determine whether the elements of Rule 23 have been met, it may not assess the merits of plaintiffs' claims. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*, 417 U.S. at 178.

This Court's admonition in *Eisen* derives directly from the language and purpose of Fed. R. Civ. P. 23. In determining a motion for class certification, courts must "at an early practicable time – determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1). The drafters of the Rule recognized that the parties will not ordinarily have conducted full discovery at the time of a class certification motion. A decision on the merits in the context of that motion would necessarily be premature and potentially incorrect. Indeed, to allow for the kind of discovery that would make a decision on the merits at the class certification stage fair and accurate would compromise Rule 23's goal of judicial efficiency. Moreover, any factual findings at the class certification stage in a disparate treatment case could run afoul of the parties' respective rights to a jury trial. 42 U.S.C. §1981a(c).

The *Eisen* rule also reflects a critical policy choice made by the drafters of the 1966 Amendments to Rule 23 – that is, that a class ruling must operate entirely independent of the merits. By separating the procedural analysis

for purposes of class certification from the substantive decision on the merits, the Committee addressed and eliminated the abuses inherent in one-way intervention. The Advisory Committee Notes to the 1966 Amendments explain:

> Hitherto . . . courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. . . . Under [the revised rule], one-way intervention is excluded; the action will early have been determined to be a class or nonclass action and in the former case, the judgment, whether or not favorable, will include the class. . . .

Advisory Committee Notes to 1966 Amendments to Rule 23(c)(3) (West 2003) (citations omitted). As the Seventh Circuit has observed, "[t]he success of the 1966 amendments to Rule 23 (which are still in force) depends on making a definitive class certification decision before deciding the case on the merits, and on judicial willingness to certify classes that have weak claims as well as strong ones." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (emphasis added). *Accord American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547 (1974) (one-way intervention "a recurrent source of abuse" under prior rule).

Contrary to this Court's *Eisen* rule, the Eleventh Circuit's decision endorsed an analysis by the district court, which required the plaintiffs to prove liability in order to satisfy Rule 23. The district court *explicitly* relied on the *liability* standard for pattern and practice cases

established by this Court's ruling in *Teamsters* in order to assess the Rule 23 requirements. "To obtain certification of a class . . . the plaintiffs must show not merely that they individually were subjected to discriminatory ('disparate') treatment; they must show that 'racial discrimination was the [company's] standard operating procedure – the regular rather than the unusual practice.'" *Cooper*, Pet. App. 322a (*quoting Teamsters*, 431 U.S. at 336). Rather than applying the requirements of Rule 23, the district court tested whether the plaintiffs met the legal standard to win on the merits. Compounding this error, the district court delved deeply into an analysis of the evidence. Pet. App. 329a-337a.[3] The court concluded that class certification should be denied because "the pattern and practice standard described in *Teamsters* [was] not met," Pet. App. 374a, again conflating the Rule 23 inquiry with the liability standard for Title VII disparate treatment pattern and practice cases.

In reviewing the district court, the Eleventh Circuit recognized that this Court's *Eisen* jurisprudence prohibited an evaluation of the merits, although the Rule 23 inquiry might nonetheless touch on the merits. "[B]oth the Supreme Court and this Court have noted since *Eisen* that evidence pertaining to the requirements embodied in Rule 23 is often intertwined with the merits, making it impossible to meaningfully address the Rule 23 criteria without at least touching on the 'merits' of the litigation." Pet. App. 40a.

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[3] As part if its determination, the district court and the Eleventh Circuit purported to evaluate the parties' expert statistical evidence against the standards set forth by this Court in *Bazemore v. Friday*, 478 U.S. 385 (1986). *Bazemore* is the standard for statistical proof *at trial*, not at class certification. *Id.* at 400-01.

The Eleventh Circuit failed to recognize, however, that the lower court's analysis went well beyond "touching on the merits." Rather than a Rule 23 determination, the district court engaged in an actual adjudication of the merits in clear violation of *Eisen*. Nevertheless, the Eleventh Circuit affirmed the district court, concluding that "it was plainly necessary for the district court to evaluate the statistical evidence the plaintiffs submitted in order to determine whether it *established* the discrimination of which plaintiffs complained." Pet. App. 30a (emphasis added). As for the plaintiffs' anecdotal evidence, the Eleventh Circuit held that "the district court acted within its discretion in determining that . . . the anecdotal evidence . . . was inadequate to *establish* discrimination classwide." Pet. App. 36a-37a (emphasis added).

Requiring class certification motions to actually establish discrimination sufficient to prevail on the merits turns a procedural inquiry into a trial on the merits, with none of the usual protections for either party attendant to a real trial. Courts following this approach thus violate not only the clear holding of *Eisen*, but the critical policy rationale that the ruling stands for – class certification should bind class members to a future determination of the merits, whatever that outcome may be. The Eleventh Circuit has essentially approved one-way intervention in clear defiance of this court's prior mandates.

C. *Certiorari* Should Be Granted Because the Eleventh Circuit Has Precluded the Use of Rule 23(c)(4) for Partial Certification of a Civil Rights Class Action

Fed. R. Civ. P. 23(c)(4) permits a district court to certify a class as to some but not all issues ("an action may

be brought or maintained as a class action with respect to particular issues . . . and the provisions of this rule shall then be construed and applied accordingly."). The Seventh Circuit recently explained the benefits of certifying solely an equitable relief claim in a Title VII class action in *Allen*, 358 F.3d at 471. In *Allen*, the district court refused to certify an 'equitable relief only' class concluding that it would "result in confusion and be overly burdensome to the resources of the court system."[4] Judge Easterbrook, writing for the panel, disagreed.

> It is hard to see why management of a class certified under Rule 23(b)(2) for prospective relief alone would be any more difficult than management of a suit with 27 individual plaintiffs seeking both legal and equitable relief. In either event, a jury trial must be held, and factual matters bearing on both damages and injunctive relief must be presented to that body. . . . What is more, handling equitable issues on a class-wide basis would solve a problem sure to bedevil individual proceedings: How is it feasible to draft and enforce an injunction that will bear on these 27 plaintiffs alone, and *not* on the other 323 black employees? Unless it is possible to prepare such relief – and we do not see how it could be, or why a court should try – then the equitable aspects of the litigation are class-wide whether the judge certifies a class action or not. (The need for, if not inevitability of, class-wide treatment when

[4] The Seventh Circuit also rejected the district court's determination that partial certification would run afoul of the Seventh Amendment. *Allen*, 358 F.3d at 472.

> injunctive relief is at stake is what Rule 23(b)(2) is about.)

358 F.3d at 469 (emphasis in original). The Seventh Circuit remanded the case with instructions to certify a class under Rule 23(b)(2) for equitable matters and to reconsider class treatment of damages.

Here, the Eleventh Circuit affirmed the denial of plaintiffs' request to certify a class solely for equitable relief. Pet. App. 41a. Its reasoning is deeply troubling because it places victims of discrimination in a quandary that Congress never could have intended. The panel concluded that, were the named plaintiffs to pursue only equitable relief on a class-wide basis, they would likely not be adequate class representatives under Rule 23(a)(4). "[T]o the extent the named plaintiffs were willing to forego class certification on damages in order to pursue injunctive relief . . . it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members." Pet. App. 40a. On the other hand, had the named plaintiffs in fact pled claims of compensatory damages on a class-wide basis, class certification under Rule 23(b)(2) would have been automatically denied under the law in that circuit.[6] This draconian 'damned if you do, damned if you don't' rule gives victims of discrimination little choice but to forfeit the class treatment that may be their only realistic hope for enforcing their civil rights and particularly the injunction that will eradicate the causes of systemic discrimination in their workplace.

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[6] The Eleventh Circuit follows the Fifth Circuit's decision in *Allison v. Citgo Petroleum*, 151 F.3d 402, 415 (5th Cir. 1998), which prohibits compensatory damages in a Rule 23(b)(2) class.

There is, moreover, a simple solution to the problem. Where the named plaintiffs choose not to pursue compensatory damages on behalf of the class, numerous circuits authorize the provision of notice and an opt-out rights in (b)(2) cases so that class members may pursue compensatory damages individually, if they wish to. "Absent class members may . . . need notice that their claims are being pursued in the class action and the opportunity either to opt out and pursue their claims separately or to intervene, should they conclude such active participation would better protect their individual interests." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 166 (2nd Cir. 2001). *See Jefferson v. Ingersoll Int'l*, 195 F.3d 894, 898 (7th Cir. 1999); *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997); *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003).

The Eleventh Circuit's decision also usurps the critical role of class counsel in making strategic decisions, such as this, for the class. Among the most important of these strategic choices are which claims to plead and which relief to seek. There may well be appropriate circumstances where the class is willing to forego compensatory damages in order to secure necessary injunctive relief.

> If a class is willing to sacrifice compensatory relief in their class action to meet Rule 23 requirements, thus evincing a paramount desire to stop systemic discrimination and prevent future harm, they should be allowed to proceed. The difficulties often encountered in certifying a Title VII class for compensatory damages should not preclude a class of plaintiffs from seeking alternative ways to serve the public interest by ending widespread discrimination.

Palmer v. Combined Insurance Co. of America, 217 F.R.D. 430, 441 (N.D. Ill. 2003).

The Eleventh Circuit's decision deprives Title VII victims of the ability to bring the class action best suited to redressing the systemic discrimination that they face.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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SOUTHERN COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents' Brief in Opposition demonstrates precisely why certiorari is warranted in this case. First, Respondents' Brief highlights the confusion regarding how courts should apply *Falcon*'s pronouncement that a Court may "look beyond the pleadings" to determine whether the requirements of Rule 23 are met without violating *Eisen*'s prohibition against conducting a preliminary inquiry into the merits at class certification. As Respondents' Brief points out, the district court cites *Eisen*'s prohibition, but then (after concluding that Dr. Madden's Reports were admissible) "spent *ten pages* conducting a painstaking, thorough analysis of Dr. Madden's Report" and conducted a detailed examination of Petitioners' anecdotal evidence. Respondents' Brief ("Resp. Brf.") at 13. The district court then denied certification on the ground that the "strength and quality of [Petitioners'] evidence" did not "convince the Court" of a pattern or practice of discrimination or "establish the discrimination of which plaintiffs complained." Pet. App. 30a, 366a. By denying certification on the ground that Petitioners' evidence did not "convince the Court" of the merits of Petitioners' claims, the court went well beyond "look[ing] beyond the pleadings" to determine whether Petitioners raised common questions and met the requirements of Rule 23. Instead, it conducted a merits-based examination of the evidence in violation of *Eisen*. Specifically, the court found that liability was not a common issue because plaintiffs failed at the class certification stage to prove to the court's satisfaction that there was a pattern or practice of discrimination at Southern Company. The Eleventh Circuit expressly affirmed on this basis. Certiorari should be granted to provide lower courts guidance as to the extent a court can examine the evidence at the class certification stage.

Respondents' Brief also confirms that the Eleventh Circuit's Opinion effectively forecloses class action employment discrimination cases in that circuit. Respondents agree that, under the Opinion, certification under Rule 23(b)(2) is precluded because if the Named Plaintiffs seek an equitable-relief only class, they are inadequate for failing to raise damages claims, but if they attempt to remedy that alleged defect by seeking damages, certification is improper because individual issues relating to damages predominate.

Recognizing that Congress never intended to remove the class-action mechanism for employment matters, Respondents pretend to avoid that result by suggesting that certification can also be sought under Rule 23(b)(3). But, if the individual issues preclude certification under Rule 23(b)(2), then they also preclude certification under 23(b)(3), which requires that common issues "predominate" over individual ones. Thus, unless certiorari is granted, victims of discrimination will be stripped of their right to pool their resources and assert class-wide claims to obtain injunctive relief to remedy the causes of systemic discrimination.

I. The Brief In Opposition Demonstrates That The Lower Courts Improperly Decided The Merits In Evaluating Class Certification

Respondents' Brief in Opposition demonstrates precisely why this Court should grant certiorari in this case: Lower courts and litigants are ignoring or do not understand *Eisen*'s proscription on a court deciding the merits of a claim when ruling on a motion for class certification. Just as the Eleventh Circuit's opinion mouths the rule that a court may not decide the merits at the class certification stage but then proceeds to affirm the denial of

certification on the basis that Petitioners did not prove the existence of a pattern and practice of discrimination, Respondents mouth the same rule and then proceed to defend the denial of certification on the basis that the district court *properly* weighed how *probative*, how *convincing* and how *strong* Petitioners' evidence of discrimination was – questions that all involve whether Petitioners proved the merits of their claims. Both the opinion below and Respondents' Brief say one thing and do another.

The issues presented in this Petition are not issues of semantics, but of substance. The Eleventh Circuit's opinion establishes a new rule: a district court may determine whether an employment discrimination plaintiff meets the requirements of Rule 23 by determining whether the plaintiff has "established," *i.e.*, proved, a pattern and practice of discrimination. Pet App. 30a ("it was plainly necessary for the district court to evaluate the statistical evidence the plaintiffs submitted ***in order to determine whether it established the discrimination of which plaintiffs complained***") (emphasis added). That rule violates *Eisen* and is different from the rule in other Circuits, such as the Second. In *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999), the Second Circuit held, "***Regardless of their ultimate persuasiveness on the issue of liability***, the statistical report and anecdotal evidence submitted by the Class Plaintiffs are ***sufficient to demonstrate common questions of fact*** regarding the discriminatory implementation and effects of [the defendant's] company-wide policies regarding promotion and discipline." That approach, which analyzes whether a plaintiffs' evidence raises common questions, not whether the plaintiffs' evidence "establishes" discrimination, is substantively and significantly different from the Eleventh Circuit's approach.

The lower courts are split on and confused about how to reconcile the *Eisen* rule with *Falcon*'s call for a "rigorous analysis" of whether the requirements of Rule 23(a) have been satisfied and *Falcon*'s statement that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982). "[C]ourts have struggled to conduct *Falcon*'s "rigorous analysis" while avoiding *Eisen's* prohibition of a preliminary inquiry into the merits." *Comment: Between "Merit Inquiry" and "Rigorous Analysis" Using Daubert to Navigate the Gray Areas of Federal Class Action Certification*, 31 Fla. St. U. L. Rev. 1041 (2004).[1] This Court should

[1] David S. Evans, *Class Certification, The Merits, and Expert Evidence*, 11 Geo. Mason L. Rev. 1, 1-2 (2002) ("One [aspect of the class certification standard] concerns whether evidence that bears on the merits of the claims should be walled off from the analysis of the class-certification questions. The other deals with whether the courts should weigh expert evidence on the class-certification requirements. These questions would seem ripe for U.S. Supreme Court review in the face of a serious split among the circuits. The Seventh Circuit's decision in *Szabo v. Bridgeport Machines, Inc.* could not be more different from the Second Circuit's decision in *Caridad v. Metro-North Commuter R.R.* In *Szabo*, the court stated that courts should consider evidence on the merits if that evidence was relevant to assessing whether the plaintiffs proposed class met the Federal Rule of Civil Procedure 23 requirements. In *Caridad*, the court stated that merits evidence was off limits and that the lower court could not consider expert evidence from the defendant. Several circuits have come close to joining one of these two camps – the First, Third, and Fifth Circuits are closer to *Szabo* than *Caridad*; the Tenth Circuit is closer to *Caridad*; the others do not have a well-settled standard and lower courts exercise considerable discretion.") (footnotes omitted); Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include An Assessment of the Merits*, 168 F.R.D. 366, 369 (1996) ("There is an obvious tension between decisions that permit assessment of the merits as part of the class action analysis, and decisions that continue to follow Eisen. The line between the two kinds of decisions is unclear, as is the logic of the courts' line-drawing process.").

resolve the split among the Circuits and the confusion regarding the meaning of *Eisen*. The question of how a court should approach the plaintiffs' evidence recurs in virtually every class case. Moreover, the Eleventh Circuit's Opinion demonstrates the danger of allowing the confusion to continue – the Eleventh Circuit has now created a rule that, despite the Civil Rights Act of 1991 and despite the language of Rule 23, allows courts, not juries, to decide the merits of claims of systemic discrimination. That rule, and the Catch-22 the Eleventh Circuit has also created, severely undermine the scheme Congress has put in place for enforcement of the nation's civil rights laws.

II. The Brief In Opposition Confirms That The Opinion Eliminates Class Action Employment Cases In The Eleventh Circuit

Respondents' brief confirms that the Opinion creates a "Catch 22" that effectively eliminates class actions as a means of protecting and enforcing civil rights in the Eleventh Circuit. If certification of an injunctive-relief only class is requested, then "the lower courts held that the named Petitioners would not have been adequate representatives" for failing to represent the interests of putative class members who might have damages claims. Resp. Brf. at 22-23. But, if the Named Plaintiffs seek to correct that alleged defect by requesting certification of damages claims, certification is improper because individual issues predominate under *Allison v. Citgo Petroleum, Inc.*, 151 F.3d 402, 415 (5th Cir. 1998).[2]

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[2] The Eleventh Circuit expressly follows the Fifth Circuit's decision in *Allison*, which prohibits compensatory damages in employment discrimination class actions. Pet. App. 39a ("In *Murray*, we adopted the position of the Fifth Circuit in *Allison*.").

Respondents do not dispute that the Eleventh Circuit Opinion creates this quandary with respect to certification under Rule 23(b)(2). Resp. Brf. at 22-25. However, recognizing that Congress clearly did not intend to foreclose the class action mechanism as a means for enforcing civil rights and obtaining injunctive relief, Respondents contend that no "Catch 22" exists because plaintiffs can pursue class-wide treatment under Rule 23(b)(3). Resp. Brf. at 24-25. But if damages claims create individualized issues that preclude certification under Rule 23(b)(2), then those damages claims also preclude certification under the stricter standard of Rule 23(b)(3), which requires that common questions of law and fact "predominate" over individual issues. *See McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 552 (5th Cir. 2003) ("Rule 23(b)(2)'s requirement that a defendant have acted consistently towards the class is plainly more permissive than 23(b)(3)'s requirement that questions common to the class *predominate* over individual issues."). Accordingly, certiorari should be granted to eliminate the Opinion's "Catch 22" which, if left intact, eliminates the ability of victims of discrimination to use the class action mechanism to remedy systemic discrimination.

III. The Seventh Amendment Issue Raised In The Brief In Opposition Is A Reason To Grant Certiorari

Respondents contend that in requesting an equitable-relief only class, Petitioners ignore the lower Courts' "concern that the Seventh Amendment posed a significant obstacle to the certification of an equitable-relief only class." Resp. Brf. at 23. But, there is a Circuit split as to whether the Seventh Amendment precludes certification of an equitable-relief only class. *Compare Allison*, 151 F.3d at

419 ("the potential overlap of issues that would be decided in bifurcated proceedings implicated significant Seventh Amendment . . . problems") *with Beck v. Boeing*, 60 Fed. Appx. 38, 40 (9th Cir. 2003) ("We reject [defendant's] argument that a bifurcated trial plan violates the Seventh Amendment's Reexamination Clause."); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 169-70 n.13 (2d Cir. 2001) (rejecting argument that "overlapping factual issues would be presented to the liability-phase and remedial-phase juries in violation of the Re-examination Clause"); *Allen v. International Truck & Engine Corp.*, 358 F.3d 469, 471 (7th Cir. 2004) ("[c]ertifying a class for injunctive purposes, while handling damages claims individually, does not transgress the seventh amendment."). Thus, certiorari should be granted to resolve that question.

IV. Certiorari Is Necessary To Resolve The Burden Of Proof At The Summary Judgment Stage After *Desert Palace*

Respondents first contend that certiorari is not warranted on the *Desert Palace* issue because Petitioners have not previously claimed that this was a mixed-motive case. But, "the terms single-motive and mixed motive . . . primarily refer to the theory or theories by which the defendant opposes the plaintiff's claim of discrimination." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 854 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003). Here, Respondents expressly asserted a mixed-motive defense in their answer to the complaint (R. 66-67) and in several subsequent pleadings. Moreover, contrary to Respondents' assertions, Petitioners raised this precise issue in the Eleventh Circuit and the Eleventh Circuit ruled upon it: "The plaintiffs argue, however, that the *McDonnell Douglas* burden-shifting analysis applied to claims of employment

discrimination was radically revised by the Supreme Court in *Desert Palace, Inc. v. Costa*. . . . The plaintiffs read *Desert Palace* too broadly." Pet. App. 48a n.17.

Respondents then contend that *Desert Palace* does not apply to this case because it impacted the burden of proof at trial, not summary judgment. *See* Resp. Br. at 26 (*Desert Palace* is a "narrow holding that relates only to *jury instructions*") (emphasis in original); *id.* at 28-29 ("*Desert Palace* really has no direct impact in the summary judgment context"). Respondents are thus arguing that at trial a plaintiff need not prove pretext to prevail, but to survive summary judgment, the plaintiff must do precisely that. That is absurd. Plaintiffs cannot be put to a higher burden at summary judgment than at trial. As a matter of law, the standard for summary judgment must mirror the standard for liability at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("we are convinced that the inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.")[3]

In arguing that *Desert Palace* does not apply at summary judgment, Respondents rely on the Eighth Circuit's quote that "*Desert Palace* really has no direct impact in the summary judgment context." *Strate v.*

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[3] *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) ("the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.' "); *Martin v. O'Conner*, 225 B.R. 283, 287 (N.D.N.Y. 1998), *aff'd*, 181 F.3d 83 (2d Cir. 1999) ("The burden proof for summary judgment rests on the same party it would rest on at trial"); *Dotson v. Broehel*, 91 Civ. 5039, No. 85-7422, 1993 U.S. Dist. LEXIS 8309 (S.D.N.Y. June 15, 1993) (same); *Kembel v. Bethlehem Steel Corp.*, 1987 U.S. Dist. LEXIS 2212 (E.D. Pa. Feb. 10, 1987) (same).